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US Law Week

Next Pre-Trial Question for Jurors: Are You Vaccinated?

By Madison Alder

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- Question could tell lawyers, judges more about potential juror views
- Courts may ask prospective jurors in questionnaires for safety reasons

Judges have a new question to consider as they ramp up in-person trials during the pandemic: whether prospective jurors can be asked about their vaccination status.

Asking about vaccination status could give insight into jurors' worldview and help the court from a safety perspective, but it could be seen as intrusive or as a proxy for asking about a juror's politics. It's ultimately up to judges whether they want those kinds of questions to be asked during jury selection, judges, lawyers, and jury experts told Bloomberg Law.

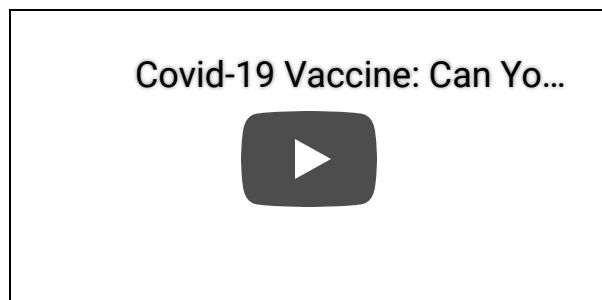
"It's a very fluid area right now," said Kimberly Mueller, chief judge of the Eastern District of California. Judges are "thinking very hard about what record is being made here and how does this information affect a party's right to a fair trial and a jury of his or her peers."

Jurors could be asked as part of pre-selection questionnaires or while they're checking in, which could provide the court with useful information for health and safety. Alternatively, the question might get raised during voir dire—the jury selection process.

"Something as salient in 2021 as the decision to intentionally remain unvaccinated is telling no matter the type of case," said Dan Johnson, CEO of jury research technology company JurorSearch.

Judges, however, can ultimately decide to not permit the question if they feel it isn't relevant. Suja Thomas, professor at the University of Illinois College of Law who studies and writes about juries, said she believes "a lot of judges would say the information is irrelevant to probably most cases."

EXHIBIT**3**



'Incredibly Insightful'

For lawyers, the question is an opportunity to get a sense for a potential juror's empathy and feelings toward other people, jury consultants said.

"On the voir dire side, it's incredibly insightful about the personality traits of those that choose to remain unvaccinated," Johnson said. A juror's answer to that question could show potential "hostility toward scientific authority and the relative value of the individual versus society."

It could also indicate political views.

A March 2021 Pew Research Center study found Democrats were "27 percentage points more likely than Republicans to say they plan to get, or have already received, a coronavirus vaccine."

Approaches are likely to vary depending on the court, which is already the case when it comes to jury selection questions.

Already, at least one court has said it will ask jurors about vaccination status in its jury questionnaire. The Northern District of Mississippi on May 3 issued an order saying it would inquire about jurors' vaccination status through its jury administrator. Answering is voluntary, the court said, and will be shared with both parties.

Judges and lawyers could also approach the question in a less direct way, said Mike Liffbrig, founder of First Court, which does jury consulting and alternative dispute resolution.

For example, they could ask "'is there anything that would trouble you working with 11 other people during this trial?'" Liffbrig said. "They don't necessarily have to make it a public confession."

'Matter of Privacy'

Concerns about protecting privacy and building trust with jurors could convince judges and lawyers to avoid the question.

Judge Thomas Zilly, considered but ultimately decided against asking the question before presiding over the first in-person jury trial in the Western District of Washington since the beginning of the pandemic.

"It's one of those issues that could go either way, but I opted not to ask given that it's a matter of privacy," Zilly said in an interview following jury selection in the case. The jury selection process in the criminal case was virtual.

The Administrative Office of the U.S. Courts, which assists courts with non-judicial business, said courts might ask virus-related questions for court safety, but getting the vaccine isn't a legal qualification for service on a jury.

"While courts may ask jurors COVID-19-related questions as part of their safety protocols, providing litigants with a jury selected at random from a fair cross section of the community remains of greatest importance," an AO spokesperson said in a statement.

Lawyers might also consider the impact of asking about vaccination status. Every question has the potential to prejudice your case and make the juror not trust you, Thomas, the Illinois Law professor, said.

"You're always looking for the characteristic or experience that will benefit your side of the case," Thomas said. "But at the same time, you want potential jurors to trust you."

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